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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1218

ANTHONY R. RUSSO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION TO STAY MANDATE AND PETITION FOR REHEARING

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MOTION TO STAY MANDATE

TO: JUSTICE WHITE:

Comes now the Petitioner and moves this Court, under Supreme Court *Rule 59(2)*, to stay the issuance of mandate until Petition for Review has been disposed of, for the following reasons:

1. That the Court of Appeals for the Tenth Circuit stayed mandate until disposition of Petition for Writ of Certiorari in this Court.

2. That filed contemporaneously herewith is Petitioner's Petition for Rehearing.

3. That there may not be sufficient time for this Petition for Review to be determined and disposed of prior to adjournment of this Honorable Court.

4. That Petitioner believes that his Petition for Rehearing should be granted and that justice requires that mandate be stayed pending disposition thereof.

Respectfully submitted,

DUNCAN & RUSSELL

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PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an Order (1) vacating its denial of the Petition for Writ of Certiorari, entered June 1, 1976, and (2) granting the Petition. As grounds for this Motion, Petitioner states the following:

1. PETITIONER WAS NEVER GRANTED A HEARING ON HIS CLAIM THAT THE GOVERNMENT HAD PROBABLE CAUSE TO BELIEVE PETITIONER WAS COMMITTING THE OFFENSE IN CONNECTION WITH WHICH THE TAP WAS SOUGHT.

The Petitioner in his Petition for Writ of Certiorari did not ask that this cause be remanded for a hearing on the issue of whether or not the Government, prior to seeking the order authorizing a wiretap and/or the extensions thereof.

Petitioner filed a pretrial motion to suppress the electronic surveillance, raising among other grounds the fact that Petitioner was not named in the application or order authorizing such wiretaps and oral interception either originally or in the extensions thereof although the Government had probable cause to do so. This was grounded upon *United States* v. *Kahn*, 415 U.S. 143, 94 S.Ct. 977, 39 L.Ed.2d 225 (1974); *United States* v. *Bernstein*, (C.A.4, 1975) 509 F.2d 996; and *United States* v. *Donovan*, (C.A.6, 1975) 513 F.2d 337, certiorari granted February 23, 1976, Case No. 75-212.

The trial court, upon the application, order and other documents, found:

> "while the defendant Russo was a person 'known', at least by hearsay information, to be committing

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> the offense, it was not necessary that his name be specified in the order as one whose communications were to be intercepted as he was not shown to be the owner of, or a person likely to be using the particular telephone to which the wire tap was to be attached. . ." (Pet. Appendix A.9)

18 U.S.C. 2518(1)(b)(iv) requires that an application for wiretap shall set forth, "the identity of the person, if known, committing the offense and whose communications are to be intercepted." Subparagraph (4) (a) requires such identity to be in an order authorizing a wiretap.

Upon the trial court's finding that the Petitioner was "known" no further evidence was offered or needed on that aspect of the issue. The Court of Appeals, however, in its Opinion (Pet. Appendix A.9) held that, "We are of the further view that the Government at that point in time did not even have probable cause to believe that Russo was committing the particular offense in connection with which the tap was sought."

Thus, without a full evidentiary hearing, the Court of Appeals overruled the trial court's finding upon a crucial issue. It was upon this basis that the Government in its Brief in Opposition (p. 4) suggested, although there was an admitted conflict in the circuits, that there was no reason to hold this case pending disposition of *United States* v. *Donovan*, supra, herein.

Nor did the trial court hold or allow a hearing to determine if the Government had "probable cause" to believe or "knew" the Petitioner would be overheard as a result of the wiretap. The trial court denied the motion to suppress because there was no showing Peti-

tioner was the owner of the telephone or a person likely to be using the telephone upon which the tap was attached. Petitioner submits that that is too restrictive a limitation. A putative defendant can be intercepted on a wiretap without owning or using the tapped phone, simply by calling to or being called by another from such phone. Petitioner was entitled to a hearing for such a determination. There are avenues available to establish the existence of such probable cause or knowledge, such as: the existence of other intercepted conversations of the defendant not offered by the Government during the trial, calling the agents as witnesses and interrogating them as to their individual and collective knowledge, and the agents' reports and logs of their interviews with their informers including Ted Irving, their surveillances, and of the operation of the wiretap itself. It was clearly from the Application for wiretap that the Government hoped to overhear the Petitioner, and they did.

The Court of Appeals further held that even if the interceptions were in violation of the Wiretap law, introduction of the interceptions was not prejudicial and, thus, constituted harmless error. The issue of whether the judicially fashioned "harmless error" doctrine can be used to overcome the specific statutory exclusionary provision in *18 U.S.C. 2511* has never previously been considered or ruled by this Court. This issue is of considerable public importance and in view of the legislative history of the law establishing the strong desire of Congress to limit and control such interceptions.

Petitioner's petition, therefore, was not requesting a review of an essentially factual determination, as contended by the respondent (Brief in Opp., pp. 3, 4) but, to the contrary, raised significant and recurring prob-

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lems concerning wiretap applications and orders, which problems have not heretofore, but should be, settled by this Court.

CONCLUSION

For these reasons, as well as those contained in the Petition for Writ of Certiorari, the denial of certiorari should be reconsidered, the order of denial should be vacated and the Petition and review of the judgment below granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in *Rule 58(2)*.

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